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# Deconstructing *iurisdictio*: the adventures of a legal category in the hands of humanist jurists.

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i. Prologue; ii. ὁβρις: the original sin; iii. φθόνος θεῶν: rightful chastisement; iv. νόστος: the journey of *iurisdictio*; v. in lieu of a conclusion: *veritas vos liberabit*?

i. If we were to assess the historical importance of any strand of legal scholarship by its later influence, many great scholars would be utterly marginalised to the benefit of more fortunate ones. This is of course what we do all the time. It is easy. But it is also reassuring: we like to think that time works in a Darwinian sense. We tend to associate the ‘greatness’ of an author with his ‘payoff’, and measure such a ‘payoff’ on its impact on the development of the law. In principle, this of course has its merits. The problem is that we often start with our modern system. Since we look backwards, we measure with hindsight. This way we build a linear, majestic highway connecting past and present. Anything outside of it may be safely overlooked, for it does not lead to us. Moreover, in building our highway we can happily revise the past and straighten any curve - after all, when the road bends it goes in the wrong direction. This way, our functional approach leads not just to oversimplifications, but often straight to re-writing history. More than simplifying, it mystifies. As it happens, legal humanism is one of the best examples of all this. There is no doubt that sixteenth century is the Age of Legal Humanism. Any textbook on European Legal History would tell you that.

We teach legal humanists – as we should – because of their alleged profound influence on the law. Perhaps the implied argument is that, if we were to question their actual influence, we might risk having to reconsider whether to teach them at all. And it is very comforting – and easy – to have a nice group of new figures occupying the sixteenth century. Otherwise one should seriously think of teaching the later *ius commune*, a subject which unfortunately lacks grand narratives and so is both difficult and terribly variegated from country to country. Whether those ‘new figures’ were effectively doing what we say they were, it is not really the point. They provide us with a superb new chapter, most useful (and timely) to break with Bartolism and make way for the institutional writers, and ultimately natural law.<sup>1</sup>

That the *mos italicus* progressively declined (though at different times in different places) is of course true. What is arguable is whether the advent of legal humanism entailed a scission among jurists between *mos italicus* and *mos gallicus*. What exactly this *mos gallicus* may be is not easy to say. We use this label to group together any heterodoxy in respect of the *mos italicus*, and we move from the draconian principle ‘*semel-semper*’. If a writer does not behave as a Bartolist at any given time, his entire work must be considered part of legal humanism.<sup>2</sup>

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\* I am particularly grateful to John W. Cairns and Paul du Plessis for their advice and scrupulous editing of the script.

<sup>1</sup> The link between legal humanism and Elegant Jurisprudence tends to be less pronounced in most textbooks. This of course seems bizarre, but only at first sight. For Elegant Jurisprudence was yet another ‘wrong’ bending of the road leading towards the Modern Truth.

<sup>2</sup> The opposite is of course also true: we can make sense of the later *mos italicus* as a unitary category only by sweeping generalisations. This has probably nurtured the Bartolists-Humanists divide nearly as much as the *semel-semper* principle. More deeply, it might have even contributed to its very creation. One of the most recent attempts to explain the interplay between *mos italicus* and *mos gallicus* speaks of ‘numerous variants and gradations’ of the ‘humanist dimension’, and labels the middle ground between

As it is well known, the two main elements of legal humanism were history and philology. Legal humanism heralded, among other things, the birth of legal history in the modern sense of the term – namely, the study of the law (mostly Roman) from a historical perspective. But precisely because of this, it was hardly a turning point in legal history. The philological element could have entailed more profound repercussions, since it challenged the very foundations of the *ius commune*. By and large, however, the scope of those repercussions was such as to neutralise them. Strict adherence to ancient texts would have led to conclusions interesting for historians, but untenable for contemporary jurists. Legal history stemmed from legal humanism, but legal historians tend to be innocuous creatures in respect to the development of the law. Further, early legal humanists were often academics in the worst sense of the term, more inclined to quarrels than cooperation. The confusion and variety of different views on what the original text might have been was such that, rather than spreading a single voice, or a polyphonic harmony, it produced a loud cacophonous sound. Or at least this was what coeval jurists perceived.

This contribution will focus on a small example of such legal humanists' 'voices' and of their reception among Bartolists, the case of *iurisdictio*. It does not aim at completeness in the least. It is most definitely not an essay on the development of the concept of *iurisdictio* in the sixteenth and early seventeenth centuries, and it lacks any pretence to guide the reader into the intricacies of the subject.<sup>3</sup> The scope is narrower and the purpose more modest: describing the position of some legal humanists on a specific subject, observing the reaction of non-humanist jurists and perhaps glimpsing the ultimate reasons behind their contrast. This is a significant caveat, for the focus of these pages is not on legal humanist theories, but on their immediate impact. Further, such an impact should not be assessed in general terms. The influence of legal humanism on the work of Bartolist lawyers was extremely variegated (to say nothing of the universe behind the terms 'non-humanist' and 'Bartolist'). Any general account would necessarily result in a broad narration with scant truth in it. Rather, I will focus on few humanist jurists, mostly of the first half of the sixteenth century, chosen mainly because of their frequent quotation by other non-humanist lawyers on the subject. Also, although the choice of the subject is arbitrary, I believe that the same results could be reached with a different subject. The important point is that the topic is abstract enough to attract legal humanists' attention but not entirely detached from reality, lest it would be ignored by non-humanist jurists. *Iurisdictio* simply fitted the bill. Lastly, although here we are on shakier ground, it offers another advantage, as its 'deconstruction' might betray some political intent.

Two last points. The term '*iurisdictio*' refers to the jurisdictional prerogatives of a judge, not to other subjects (e.g. territorial jurisdiction, state jurisdiction, etc.). Second, references to secondary sources are extremely limited. This is intentional. There are many modern excellent works touching on the subject, but very few devoted to it.

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Bartolism and legal humanism as 'moderate humanism'. Beyond this threshold the Elegant Jurisprudence lies; behind it, we are still in the province of Bartolism. R. Lesaffer, *European Legal History* (trans. J. Arriens), Cambridge: University Press, 2009, p. 353-354.

<sup>3</sup> For more exhaustive works on the subject see first of all the seminal study of M.P. Gilmore, *Argument from Roman law in political thought, 1200-1600*, Cambridge (Mass.): Harvard University Press, 1941, esp. p. 77-85, and more recently the important contribution of L. Mannori, *Per una 'preistoria' della funzione amministrativa. Cultura giuridica e attività dei pubblici apparati nell'età del tardo diritto comune*, in *Quaderni Fiorentini per la Storia del Pensiero Giuridico*, 19 (1990), p. 323-504, esp. p. 345-407. To some extent, despite the somewhat different perspective, the present paper is meant as a gloss on Mannori's remarkable study.

Several studies mention some of the issues related to our subject while looking at other subjects. Pointing at them might have risked shifting the focus of these pages.

ii. Early modern public law evolved rapidly. But it did not move away from its medieval framework. Rather, it built on it. The whole administrative structure of the early modern state was still rooted in the medieval concept of *iurisdictio*. In a paradox of history, the modern idea of *iurisdictio* is probably closer to the Roman than the medieval one. It is well known that the medieval concept of *iurisdictio* derives from the conflation of two distinct categories, *iuris-dictio* (to 'say' the law) and *iuris-ditio* (the 'power' of the law).<sup>4</sup> Of the two concepts, medieval jurists considered that of *iuris-ditio* to be the general one. As such, the general concept of *iurisdictio* did not have a jurisdictional meaning, but it simply meant 'authority'.<sup>5</sup> In turn, this general *potestas* was divided in two categories: jurisdictional power on the one hand, and any other power (we would say, both administrative and legislative functions) on the other. Jurisdictional power was termed '*iurisdicito simplex*',<sup>6</sup> while the other category '*imperium*'.<sup>7</sup> *Imperium* was in turn separated into *merum* and *mixtum*.<sup>8</sup> The distinction was based on their different aim: *imperium merum* was concerned with public utility; when on the contrary the utility was mainly private, the *imperium* was *mixtum*.<sup>9</sup> Further, *imperium* - both *merum* and *mixtum* - and *iurisdicito simplex* were each fragmented into six levels, so that, for

<sup>4</sup> C. Fasolt, *The Limits of History* (Chicago: University Press, 2004), p. 178-185; B. Paradisi, *Il pensiero politico dei giuristi medievali*, in L. Firpo (ed.), *Storia delle idee politiche economiche e sociali* (Torino: Utet, 1983), vol. II, pt. 2, p. 273-275.

<sup>5</sup> Accursius, *Digestum vetus*, Parisiis, apud Gulielmum Merlin, 1566, vol. I, ad Dig. 2.1.3, col. 164, § *Mixtum est*; Bartolus de Sassoferato, *Super prima et secunda parte Digesti veteris*, Basileae, ex Officina Frobeniana, per Hieronymum Frobenium, et Nicol. Episcopium, 1562, ad Dig. 2.1.3, p. 112, § *Imperium*, n. 3-4: '*qu[a]ero unde dicatur iurisdicito? dicit glossa hic quod dicitur a dictione quod est potestas et iuris quasi iuris potestas [...] nam potestas et iurisdicito idem sunt, ut dixi: et est potestas iuris, ergo est iurisdicito.*' See also Azo, *Summa codicis*, Basileae, per I. Heruagium, 1563, ad C.3.13, § *Quoniam*, col. 183, n. 1: '*dicatur autem iurisdicito a ditione (quod est potestas) et iure, quasi dicat, legitima potestas.*'

<sup>6</sup> Bartolus de Sassoferato, *Super prima et secunda parte Digesti veteris*, cit., ad Dig. 2.1.1, § *Ius dicentis*, n. 2, p. 107.

<sup>7</sup> *Ibid.*: '*Ius dicere potest etiam ubi nullum est litigium, ut quando interponitur decretum, super alienatione rerum minorum, vel super transactione alimentorum, quae sunt misti imperii*' (*mistus* was a medieval corruption for *mixtus*). It follows that *iudicium dicere* is not coterminous with *ius dicere*. While the former denotes *iurisdicito simplex*, the latter is the expression of *imperium*. See *ibid.*, n. 1: '*venio ad quod et primo ad ea quae tanguntur in gl. et quaero quare dicit ius dicentis, et non iudicis dicentis? Respond[e]o gl. hoc ideo quia non de omni iudice, sed tantum de eo qui habet merum et mixtum imperium.*' For this reason Bartolus stresses the importance, in the *Liber Extra*, of the term '*ius dicere*' to designate the chief prerogative of the *iudex*. See *ibid.*, n. 4: '*nam idem est dicere iudex, quod ius dicens, extra de ver. sig. c. forum [X.5.10: 'iudex dictus quasi ius dicens populo'] quod placet, quia hic sincopatur, quia detrahitur litera: scilicet de medio. Item quia appellatio iudicis refertur ad [iudices] maiores [...] Et ideo dicitur [ius] dicentis, et non iudicis, quia sic placuit sibi.*' Cf. Azo, *Summa Codicis*, cit., ad C.3.13, § *Quoniam*, n. 20, col. 187: '*quod non dixit officium iudicis, sed officium ius dicentis.*'

<sup>8</sup> Bartolus de Sassoferato, *Super prima et secunda parte Digesti veteris*, cit., ad Dig. 2.1.3, § *Imperium*, n. 4, p. 112: '*iurisdicito in genere sumpta, dividitur in dua species, scilicet in imperium simpliciter sumptum, et in specie quod est iurisdicito [...] nam potestas et iurisdicito idem sunt, ut dixi: et est potestas iuris, ergo est iurisdicito. Idem de mero et mixtum imperio [...] cui etiam iurisdicito inest, sicut genus inest speciei suae [...] Est ergo iurisdicito genus. [...] imperium subdividitur in merum, et mixtum. Non enim iurisdicito dividitur in merum et mixtum imperium, sed imperium simpliciter sumptum dividitur in merum et mixtum.*' See further *ibid.*, n. 7-13 and n. 14-22, p. 112-113, on *merum* and *mixtum imperium* respectively.

<sup>9</sup> *Ibid.*, n. 6. Cf. also *ibid.*, n. 15, p. 113.

instance, *merum imperium* ranged from the power to enact general laws to that of imposing a modest fine.<sup>10</sup>

This complex system was based on two pillars. First, there was no clear-cut conceptual distinction between *iurisdictio* and *imperium*. They formed a single and unitary category in which jurisdictional prerogatives were but a part of a more general power of government.<sup>11</sup> Second, and crucially, the different kinds and degrees of jurisdiction were not to be distinguished according to the functions of the magistrate or the territorial extension of his jurisdiction, but rather according to the personal status of the *iudex*,<sup>12</sup> so that the first and foremost division was that between *iudex nobilis* and *iudex mercenarius*.<sup>13</sup> Unlike the *iudex mercenarius*, the *iudex nobilis* did not need a lawsuit to exercise his jurisdiction. Ultimately, the distinction between *iurisdictio simplex* and *imperium* did not lie in their specific characteristics, but in the status of the *iudex* who exercised them.

iii. Even from such a short survey it should be clear that the medieval understanding of *iurisdictio* was hardly faithful to the Roman sources. Unsurprisingly enough, the first jurist to insist on the point was Andreas Alciatus (Andrea Alciato, 1492-1550). In the second book of his *Paradoxa*, Alciatus methodically demolished the *ius commune* concept of *iurisdictio*. There is nothing in the sources to justify the idea of *iurisdictio* as a broad and all-encompassing genus. *Merum imperium* hardly designs a general, all-encompassing power. The sources speak of 'merum' in the restrictive sense of 'solum' - and not 'absolute' and 'unbounded', as the Civilians would have it. When *imperium* is *merum*, it has no *iurisdictio*. Deprived of any jurisdictional prerogative, *merum imperium* is just the '*potestas animadvertendi in facinorosos homines*' (D.2.1.3), that is, the power to inflict a punishment.<sup>14</sup> Since Ulpian speaks of a *gladii potestas*, this punishment must refer only to criminal proceedings. Clearly, it has nothing in common with the jurisdictional sphere - *iurisdictio*.<sup>15</sup> Not only, therefore, do extra-jurisdictional powers ('*ditio*') have hardly any similarity at all with *iurisdictio*, but they are not even included in *merum imperium*. Correctly understood, *merum imperium* is but a magistrate's prerogative, not the supreme power reserved to the prince alone.<sup>16</sup> In turn,

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<sup>10</sup> *Ibid.*, n. 8-12, 17-22 and 24-26, p. 112-114 (on *imperium merum*, *imperium mixtum* and *iurisdictio simplex* respectively). This six-fold division meant that not even the whole of *iurisdictio* (*simplex*) was entrusted to the *iudex mercenarius*: *ibid.*, n. 24, p. 113.

<sup>11</sup> See the classic works of P.N. Riesenbergh, *Inalienability of Sovereignty in Medieval Political Thought* (New York: Columbia University Press, 1956), p. 35, and of F. Calasso *I glossatori e la teoria della sovranità* (Milano: Giuffrè, 1957), p. 49.

<sup>12</sup> Bartolus de Sassoferato, *Super prima et secunda parte Digesti veteris*, cit., ad Dig. 2.1.3, § *Imperium*, n. 15-16, p. 113.

<sup>13</sup> *Ibid.*, ad Dig. 2.1.1, § *Ius dicentis*, n. 12, p. 108-109: '*officium nobile est quod per se stat sive hoc iudex suo motu exerceat. sive ad postulationem alterius [...] Quoddam est officium mercenarium quod per se non stat. sed deservit actioni*'.

<sup>14</sup> Andreas Alciatus, *Paradoxorum ad Pratum libri sex*, Mediol[ani], Alexander Minutianis, 1518, lib. 2, ch. 6, fol. 17r: '*merum imperium nil aliud esse, quam potestatem gladio animadvertendi in facinorosos homines: et haec definitio cum re definita convertitur: quamobrem iure civili valere eam, negandum non est. [...] gladius hic non simpliciter pro telo accipi debet, sed pro quacunq[ue] poena, qua ex delicto plectendus sit reus*'. Cf. also *ibid.*, lib. 2, ch. 7, fol. 17v.

<sup>15</sup> *Ibid.*, lib. 2, ch. 8, fol. 17v: '*imperium aut merum, aut mixtum est. Merum imperium est habere gladii potestatem ad animadvertendum in facinorosos homines. Mixtum est cui etiam iurisdictio inest, quod in danda bonorum possessione consistit. Iurisdictio est etiam iudicis dandi licentia*'.

<sup>16</sup> *Ibid.*, lib. 2, ch. 6, fol. 17r: '*si merum imperium nil aliud est, quam potestatem animadvertendi in facinorosos homines habere, certe haec potestas magistratibus tribuitur: quo circa et merum imperium habere dicendum est*'.

the sources are quite clear in that *mixtum imperium* consists of *bonorum possessio* and of *iudicis dandi licentia*.<sup>17</sup> The entire distinction so dear to Civilians between *iudex nobilis* and *mercenarius*, and ultimately between public and private utility, is therefore completely groundless.<sup>18</sup> For instance, condemnation and absolution alike are principally aimed at public utility. But if *merum imperium* had the monopoly of all actions primarily inspired by public utility, then we should conclude that absolution would fall within *merum imperium* too. And this is not what the sources tell us. In short, the whole understanding of the Civilians, 'who followed Bartolus as a prince of the Legal Republic',<sup>19</sup> was seriously flawed.

Alciatus' *Paradoxa* heralded the offensive. And yet his triumph was partial. Almost by default, among humanist jurists the *pars destruens* of an author's argument was considerably more successful than his *pars construens*. While most legal humanists agreed on what *iurisdictio* and *imperium* were not,<sup>20</sup> no such consensus was reached on what they actually were. The reconstruction proposed by Alciatus was successful mainly in its repudiation of the old scheme, but not in replacing it with a new one.<sup>21</sup>

Having duly deconstructed the Civilians' concept of *iurisdictio*, the problem was how to put its pieces together. *Merum imperium* was particularly problematic, and to some extent representative of the legal humanists' approach, as it triggered endless learned disputes. Humanist jurists proved considerably more apt at digging into the texts than building on them. The main points on which, by and large, many of them tended to

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<sup>17</sup> *Ibid.*, lib. 2, ch. 8, fol. 17v. Space limits do not allow forays into the intricacies of the subject and most of all on the manifold interpretations of '*iudicis dandi licentia*'. The issue of *iurisdictio delegata* gave rise to endless and very complex controversies on its meaning and - moreover - scope. Thankfully, however, such controversies did not create new interpretations of *imperium* but rather depended on it. We will return to the point in the conclusion.

<sup>18</sup> *Ibid.*, lib. 2, ch. 7, fol. 17v.

<sup>19</sup> *Ibid.*, '*quem, uti legalis reipublicae principem alii sequuntur*'.

<sup>20</sup> An obvious exception must be made for Ulrichus Zasius (Huldrych Zäsi, 1461-1536). On our subject, Zasius was a strict adherent to the Bartolian orthodoxy, the main addition being solely a more punctual reference to the textual sources than the average Civilian. Nowhere he detached himself from the Bartolian reading of jurisdiction (at the most reporting some variations proposed by Baldus). In his work both definitions and scope of *iurisdictio*, *mixtum* and *merum imperium* are perfectly adhering to the Bartolian *lectura*, together with the distinction between *publica* and *privata utilitas* and between *iudex nobilis* and *mercenarius*, as well as with *delegata iurisdictio*. Zasius' work on *iurisdictio* and *imperium* may be found in his comment to *De iurisdictione omnium iudicum* (*In sequentes ff. veteris titulos lecturae nempe de iustitia et iure, de legibus, de iurisdictione omnium iud.*, Basileae 1537, p. 101-126), and in his *Paratitla* to the first part of *Digestum vetus* (*In primam Digestorum Partem Paratitla*, Basileae, apud Mich. Ising, 1539, ad D.2.1, p. 34-39). The first of the two works is particularly detailed on *iurisdictio delegata* (ad D.2.1.4-5, p. 111-126), a subject which on the contrary would receive just scant attention in the *Paratitla*. Zasius' work on our subject received great attention - especially by non-humanist jurists. No Civilian had any problem in quoting him approvingly or in relying on his interpretation. Zasius was by far the 'legal humanist' most frequently quoted by later Bartolists. On Zasius' alleged humanistic approach see S. Rowan, *Ulrich Zasius. A Jurist in the German Renaissance, 1461-1535* (Frankfurt am Main: Klostermann, 1987), p. 93-96, 105-108 and esp. 206-209.

<sup>21</sup> Alciatus followed a three-fold division based on *actio*, *persecutio* and *accusatio* to explain *iurisdictio*, *mixtum* and *merum imperium* respectively. Alciatus, *De Verborum Significatione Libri Quat[tuor]*, Ludgunum, Seb. Gryphius, 1530, ad D.50.16.178.2, § *Actionis*, p. 219-220; ad D.50.16.9, § *Persecutione*, p. 109; ad D.50.16.197, § *Indicasse*, p. 232 respectively. See also (but on a smaller extent) his *Paradoxorum ad Pratum libri sex*, cit., lib. 2, ch. 10-11, fols. 18r-19r. In particular, the least successful element of Alciatus' three-fold division was probably the explanation of *mixtum imperium* as *persecutio*, chiefly because leading to an autonomous category rather than to an intermediate one between *iurisdictio* and *merum imperium*. As it will become apparent in the next few pages, it was precisely the closeness between *iurisdictio* and *mixtum imperium* what attracted most humanist jurists (and so possibly made Alciatus' scheme less appealing).

agree were two. First, as the *modica coercio* of *mixtum imperium* is instrumental to *ius dicere*, *iurisdictio* and *mixtum imperium* are deeply related, and hardly separable from each other. Second, *merum imperium* is fully separated from *mixtum imperium* and *iurisdictio*. And this was precisely the problem. *Merum imperium* is described in the sources as *animadversio in facinorosos homines*. Hence, most legal humanists considered it as the *executio* of the judgment in criminal cases. But if the *executio* is entrusted to the magistrate with *merum imperium*, and *merum imperium* is wholly detached from *iurisdictio*, it follows that such a magistrate may not have any *cognitio* of the subject matter. In short, the magistrate empowered to give execution to the judgment could not also hear the dispute, and vice versa.

This conclusion was already implicit in one of the first French legal humanists who followed Alciatus, Ioannis Longovallius (Jean Longueval). But Longovallius did not bring Alciatus' argument to its ultimate consequences.<sup>22</sup> The honour belongs to Ioannis Gillotus (Jean Gillot).<sup>23</sup> Gillotus sharply divided the legal proceeding in three phases: *cognitio*, *sententia*, and *executio*. As with Alciatus and Longovallius, and perhaps even more than either of them, in Gillotus *mixtum imperium* encompassed almost any judicial prerogative.<sup>24</sup> While *cognitio* and *sententia* pertain to *iurisdictio* and *mixtum imperium*, *executio* is the province of *merum imperium*. *Executio* is wholly detached from the legal proceeding because it is only concerned with executing the judgment ('*sententiae effectus*'). Once the decision is rendered, the controversy is over. This way, the magistrate with *mixtum imperium* enjoys full *iurisdictio* over the dispute while at the same time the distinction between *mixtum* and *merum imperium* is maintained.<sup>25</sup> In Gillotus, the prerogatives of the ordinary (or delegated) judge were consistent with the sources and so surely correct. But the problem remained in respect to the magistrate with *merum imperium*: he would have to execute someone else's judgment without being able to look at it. Lacking any *cognitio*, he would resemble more an executioner than a magistrate. The problem was particularly thorny in case new evidence emerged after the jurisdictional phase. Gillotus sought to solve the problem by restricting the divide between *merum* and *mixtum imperium*. To this end he resorted to the old (Civilian) stratagem of dividing a legal category in a broad and general sense and a narrow and specific one. So, Gillotus argued, when specifically referred to criminal cases *merum imperium* is to be understood in its narrow meaning - *merum* as 'only': only *imperium*, without any *iurisdictio*.<sup>26</sup> In this sense, *merum imperium* is just *potestas gladii*. Its scope is restricted exclusively to *animadvertere*, which simply means chastisement ('*punitionem ipsam significat*').<sup>27</sup> As such, in criminal trials *merum*

<sup>22</sup> Ioannis Longovallius, *Nova et facilis declaratio ad legem imperium ff. de iurisdictione omnium iudicium*, Parisiis, 1528. Longovallius' treatise was divided in four parts. The first two were devoted to a lengthy critique of the relevant Bartolist authors. The third, and rather shorter, to an exposition of the correct approach on the subject. The fourth, and longest, to its applications. *Merum imperium* consists of *mera coerc[it]io* (pt. 3, fol. 20v), whereas in *mixtum imperium* coercion is instrumental to the exercise of *iurisdictio* (*ibid.*, fol. 21r). The difference between the two lies therefore in that the *coercitio* of *mixtum imperium* is but a means to a different end, which is *iurisdictio* in its broad sense (*ibid.*, fol. 22r). It follows that the *modica coercitio* of *mixtum imperium* is instrumental to *iurisdictio*, and moreover that *mixtum imperium* and *iurisdictio* form a unitary category, radically opposed to *merum imperium*.

<sup>23</sup> Ioannis Gillotus, *De iurisdictione et imperio libri duo*, Parisiis, O. Mallardus, 1538. As this (in all probability, first) edition is extremely rare, I have relied on the more accessible version in Zilettus, *Tractatus universi iuris*, 1584, vol. III, pt. 1, fols. 2r-18r.

<sup>24</sup> *Ibid.*, pt. 2, ch. 11-14, fols. 13r-15r, and ch. 15, n. 3, fol. 13r.

<sup>25</sup> *Ibid.*, pt. 1, ch. 16, n. 1, fol. 8r. Cf. *ibid.*, pt. 2, ch. 19, fol. 15r.

<sup>26</sup> *Ibid.*, pt. 1, ch. 6, n. 2, fol. 3r.

<sup>27</sup> *Ibid.*, pt. 1, ch. 7, fol. 3v, and esp. ch. 8-9, fol. 4r-v.

*imperium* refers exclusively to the *executio* of the decision.<sup>28</sup> Being solely concerned with *executio*, it does not partake in the act of rendering the judgment. For criminal offences, *merum imperium* commences when *iurisdictio* finishes.<sup>29</sup> By contrast, in civil proceedings *merum imperium* may be considered in its broader meaning of *potestas iuris dicendi*. The so-called *lex imperium* (D.2.1.3), concluded Gillotus, is clear in keeping distinct *mixtum* from *merum imperium* so long as the latter means *gladii potestas animadvertendi in facinorosos homines*. But when *merum imperium* does not have such a meaning, the execution of the decision may well be entrusted to the same magistrate that pronounced it.<sup>30</sup>

Insisting on the residual nature of *merum imperium* and on the strict separation of *executio* from *cognitio*, Gillotus reached a deadlock. He was able to solve it only by resorting to some acrobatic interpretations of *merum imperium*, which however remained hardly satisfactory. At least, in the eyes of his fellow legal humanists. An attempt to solve the impasse was made by another (and more famous) French legal humanist, Petrus Loriotus (Pierre Loriot, d. 1568 ca.).<sup>31</sup> Loriotus accepted Gillotus' three-fold division of *cognitio*, *sententia* and *executio*,<sup>32</sup> but sought to avoid the resulting impasse. According to Loriotus, *iurisdictio* had to be kept wholly detached from *merum imperium* (which was merely '*delictorum coercio*'), in accordance with the sources.<sup>33</sup> On the other hand, it was imperative that the magistrate empowered with *executio* (and so with *merum imperium*) could also have *cognitio*, lest it appeared as a mere executioner. Logically, the only way to achieve both things was to relegate *iurisdictio* to the pronouncement of the *sententia*, and to keep it distinct from *cognitio*.<sup>34</sup> Hence, for Loriotus *iurisdictio* had to become only the act of pronouncing the decision, *iuris-dicere* in the narrowest possible sense of the term.<sup>35</sup> This way, *merum imperium* and *iurisdictio* would remain separated, but at the same time the magistrate empowered with *executio* could also have *cognitio* of the matter.<sup>36</sup>

Loriotus' scheme was undoubtedly ingenious, but it did not meet with much success among other legal humanists. And this not because his dilemma of *cognitio*, *sententia* and *executio* might resemble the famous river-crossing puzzle with a wolf, a goat, and a cabbage. Rather, because the cure of Loriotus was almost worse than the Bartolian disease. Firstly, *merum imperium* was once again a general *potestas* encompassing the whole criminal jurisdiction.<sup>37</sup> Secondly, Loriotus' *iurisdictio* was even narrower than the Bartolists' *iurisdictio simplex*. Once again, albeit for different reasons, it occupied

<sup>28</sup> *Ibid.*, pt. 1, ch. 10, n. 2, *fol.* 4v-5r; pt. 2, ch. 3, n. 1-2, *fol.* 7v, and ch. 5, *fol.* 8v.

<sup>29</sup> *Ibid.*, pt. 2, ch. 5, n. 9-10, *fol.* 8v.

<sup>30</sup> *Ibid.*, pt. 2, ch. 6, n. 6, *fol.* 9r-v.

<sup>31</sup> Petrus Loriotus, *De iurisdictione et imperio*, in Id. *De Iuris Apicibus, Tractatus*, vol. VIII, Ludguni, apud Sebastianum Gryphum, 1545, cols. 29-46. Loriotus was probably the only legal humanist to write on the subject in a schematic (and concise) way.

<sup>32</sup> *Ibid.*, axiomata 15-16, cols. 33-34.

<sup>33</sup> *Ibid.*, esp. axiomata 10, 14-15, 25 cols. 32-34 and 36-37.

<sup>34</sup> *Ibid.*, axioma 20, col. 35: '*Adde sanam non esse Gilloti interpretationem, causae cognitionem pro iurisdictione accipientis: cum res separatae sint, et assessor cognitionem habeat, non iurisdictionem: sit qu[a]e cognitio usque ad sententiam dumtaxat, iurisdictione proprie et in sententia est, et in executione*'. Cf. *ibid.*, axioma 25, col. 37: '*merum purum significat: ut Imperium merum sit pura potestas et separata, non a cognitione (ut Gillotus arbitrabatur) sed a iurisdictione*'.

<sup>35</sup> *Ibid.*, axiomata 1-3, cols. 29-30.

<sup>36</sup> *Ibid.*, axioma 26, col. 37: '*non obstat quod in executionibus non admittatur causae cognitio, id enim ex eo fit, quod ante executionem (sic) iam plena causae cognitio adhibita fuit, sine qua nulla esset executio*' (sic).

<sup>37</sup> *Ibid.*, axioma 38, col. 41. Cf. also axiomata 26 and 38, cols. 37 and 41 respectively.



a very marginal role - in Lorientus, the mere pronouncement of the decision.<sup>38</sup> Lastly, *mixtum imperium* (vaguely defined as '*potestas specialiter concessa, cui iurisdictio inest*')<sup>39</sup> was not - as we shall see - the main and nearly all-encompassing category of other humanist jurists, but it was relegated to the execution of civil decisions<sup>40</sup> and to non-contentious jurisdiction.<sup>41</sup>

Although of course incorrect, it would be tempting to use the 1540s to draw a line between earlier and later legal humanist works - both on our subject and, perhaps, beyond it. None of the earlier efforts of humanist jurists to provide a coherent and systematic picture of *iurisdictio* and *imperium* was particularly successful. But they remained the main ones. It was not the difficulty of the task that discouraged later authors. Rather, it was a progressive shift in their interest. From the 1540s their work became increasingly academic and abstract, and its focus progressively more detailed and specific. Each topic underwent a scrupulous scrutiny according to its adherence to classical sources, legal and non-legal alike. Whether any single sub-topic would fit into the larger picture, it was no longer the point. The more the attention focused on the single classical sources, the less it mattered whether they could underpin abstract and general principles. The door to unbridled historical and philological speculations, already unlocked, now burst open.

With specific reference to our subject, it is with the 1540s that the 'deconstruction' of medieval *iurisdictio* lost its character of instrumentality, a means to the end of providing accurate categories more faithful to the sources. The emphasis was progressively more on the analysis of the sources and less on general legal categories. By and large, source analysis became an end to itself. Similarly, the early contrasts among scholars such as Longovallius, Gillotus and Lorientus (each devoting a considerable part of his work to questioning that of the others, Alciatus included) now became fully-fledged academic squabbles on the (allegedly, scarce) learning of the rivals.

In the late 1540s Duarenus, Goveanus and Corasius proposed a new interpretation of *iurisdictio* and *imperium*. Franciscus Duarenus (François Douaren, 1509-1559), accepted the division between *merum imperium* on the one side and *iurisdictio* and *mixtum imperium* on the other, but he offered a new explanation for this, rooted on the jurisdictional prerogatives of different magistrates.<sup>42</sup> The *praetor* had only jurisdiction in private disputes, not in criminal offences. Those were entrusted to the *quaestores*.<sup>43</sup> Shortly thereafter Antonius Goveanus (António de Gouveia, ca.1505-ca.1566) published his succinct comment to D.2.1.3.<sup>44</sup> Goveanus agreed with Duarenus that

<sup>38</sup> *Ibid.*, axioma 38, col. 41 ('*nihil aliud [...] quam iuris dicendi officium, iure magistratus concessum*'). Cf. also axiomata 26 and 36-37, cols. 37 and 40-41 respectively.

<sup>39</sup> *Ibid.*, axioma 31, col. 39. Lorientus' difficulty to provide a neat definition of *mixtum imperium* might derive from the complex efforts to disentangle *cognitio* from *sententia*.

<sup>40</sup> *Ibid.*, axioma 38, col. 41.

<sup>41</sup> More specifically: *bonorum possessio, missio in possessionem, restitutio, emancipatio, adoptio, interdicta prohibitoria* and *fideicommissa*: *ibid.*, axioma 33, cols. 39-40.

<sup>42</sup> Franciscus Duarenus, *Disputationes anniversariae Liber primus*, Ludguni, apud Seb. Gryphum, 1547, ch. 53, p. 128-132.

<sup>43</sup> *Ibid.*, p. 129-130: '*Praetorem Romae creatum fuisse, ut ius diceret in urbe de causis negotiisque privatis, non ut animadverteret in facinorosos homines [...] Populus enim, cuius summa potestas erat, quoties animadversio necessaria videbatur, Quaestores sive Quaestores constituerebat, qui adversus facinorosos inquirerent, idque extra ordinem, cum nullo magistratu fungerentur*'.

<sup>44</sup> Antonius Goveanus, *ad Legem III D. Imperium, De iurisdictione omnium iudicium*, Tolosae, 1545. I have used the later edition of Goveanus' work edited by Meerman, *Antonii Goveani opera iuridica, philologica, philosophica. Ex bibliotheca viri nobilis Gerardi Meerman edidit, vitamque auctoris*

*merum imperium* related exclusively to capital punishment and that it belonged to 'caeteri praetores' - mainly the *quaestores* - and not to the *praetor urbanus*.<sup>45</sup> But in turn Gouvea offered a new interpretation on the division between *iurisdictio*, *mixtum* and *merum imperium* based on the prerogatives of each magistrate. While it is clear that the *praetor urbanus* lacked *merum imperium* and had both *mixtum imperium* and *iurisdictio*, the *praeses provinciae* enjoyed all three.<sup>46</sup> The treatise of Ioannis Corasius (Jean de Coras, 1512-1572) followed.<sup>47</sup> Although he did not refer explicitly to either Duarenus or Goveanus, Corasius agreed with them on the main points,<sup>48</sup> especially on the division of prerogatives between *praetor* and *quaestor*.<sup>49</sup> The main difference with his two colleagues lay in Corasius' interpretation of *mixtum imperium*. To some extent, Corasius again proposed Gillotus' all-encompassing notion of *mixtum imperium*. Moving from the separation of prerogatives between *praetor* and *quaestor*, Corasius reasoned, Gillotus' shortcomings could be easily avoided. In any matter in which the *praetor* has *cognitio*, he also enjoys *executio*. Although in theory functional to the exercise of *iurisdictio*,<sup>50</sup> in Corasius' analysis *mixtum imperium* stretched beyond the scope of jurisdictional prerogatives. This allowed him to include in *mixtum imperium* also prerogatives more authoritative than strictly jurisdictional in their nature, such as *in integrum restituere*.<sup>51</sup>

In between the publication of these treatises, Eguinarius Baro (François Eguinaire, Baron du Kerlouan, 1495-1550) sent to the press two works on the same subject, triggering one of the harshest disputes among legal humanists. Baro's theory resembled those of other humanist jurists only in the *summa divisio* between *iurisdictio* and *mixtum imperium* on the one hand and *imperium merum* on the other.<sup>52</sup> Beyond that, it was *sui generis*. He used the lack of *iurisdictio* so characteristic of *merum imperium* to extend its scope - at the expenses of *mixtum imperium*. Thus, for Baro *merum imperium* does not consist solely in *animadversio*. Rather, what lacks *iurisdictio* is to be considered as *merum imperium*, and not as *mixtum*.<sup>53</sup> Further, and moreover, he argued for a two-fold notion of *iurisdictio*. In its narrower sense, *iurisdictio* describes the prerogatives of the *iudices pedanei* (whereas the powers of the *praetor* are grouped together in *mixtum imperium*).<sup>54</sup> In its broader meaning, much to the contrary,

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*praemisit Iacobus van Vaassen, iurisconsylvts, Roterodami, apud Henricum Beman, 1766, p. 3-6. Goveanus' treatise was published in 1545, and so two years before Duarenus'. However the treatise of Duarenus must have circulated earlier, for Goveanus dedicated his treatise to Duarenus as a comment on his friend's work.*

<sup>45</sup> *Ibid.*, p. 5.

<sup>46</sup> *Ibid.*, p. 5-6.

<sup>47</sup> Ioannis Corasius, *Miscellaneorum iuris civilis libri sex*, Ludguni, apud Gulielmum Rovillum, 1549, lib. 3, *de iurisdictione et imperio*, p. 272-280.

<sup>48</sup> Specifically: *iurisdictio* and *mixtum imperium* were bound together, and *iurisdictio* was completely separated from *merum imperium*, *ibid.*, n. 1-2, p. 272-273 and n. 4, p. 275, respectively. On *merum imperium* see further *ibid.*, n. 10, p. 277.

<sup>49</sup> *Ibid.*, n. 5, p. 276.

<sup>50</sup> Corasius defined *mixtum imperium* as '*auctorita[s] et potesta[s] quandam decernendi, dandi, dicendi, addicendi et coercendi, in pecuniariis causis, citra tamen litis controversiae decisionem. Tunc enim esset iurisdictio, quae tamen, ut effectum habeat faciliusque explicari possit, mixto imperio ius dicendi utitur*'. *Ibid.*, n. 15, p. 279. Cf. also *ibid.*, n. 6, p. 276.

<sup>51</sup> *Ibid.*, n. 17-18, p. 279-280.

<sup>52</sup> Eguinarius Baro, *Ad τα πρότα Digestorum*, Parisiis, apud Iacobum Gazellum, 1548, tit. 1, l. 3, *fol.* 67v-68v; *Id.*, *Variarum quaestionum publice tractatarum, ad digesta iuris civilis l. de iurisdictione*, Ludguni, apud Seb. Gryphium, 1548, p. 66-67 and 69-70.

<sup>53</sup> *Id.*, *Ad τα πρότα Digestorum*, cit., tit. 1, l. 4, *fol.* 68v. An example is the *cautio praetoria*, which for Baro does not belong to *mixtum* but to *merum imperium* (*ibid.*).

<sup>54</sup> *Id.*, *Ad digesta iuris civilis l. de iurisdictione*, cit., p. 138.

*iurisdictio* represents the entire jurisdictional power. It follows that, in this second and general sense, *iurisdictio* is the genus encompassing also *mixtum imperium*.<sup>55</sup> In this broader meaning, *iurisdictio* resembles more a general power than the limited task of settling a dispute. Looking back at the three-fold division between *cognitio*, *sententia* and *executio*, Baro argued that *iurisdictio* encompasses both *sententia* and *executio*, but not really *cognitio* - that is up to the delegated judge.<sup>56</sup> At this juncture, it is hard to see any substantive difference with the old Bartolian 'tree of jurisdiction'. Indeed, in his apostasy, Baro arrived to speak the unspeakable: as a matter of fact, Bartolus was quite right, though he should have left out *merum imperium*.<sup>57</sup>

The answer of Duarenus and Goveanus came at once.<sup>58</sup> What is interesting for our purposes is that both replies went even deeper in their textual analysis than the original treatises, studiously avoiding any general overview. For it was precisely when an author sought to draw general conclusions that his argument detached from the Roman texts - and so it became most vulnerable.

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<sup>55</sup> *Ibid.*, p. 106, '*Iurisdictio enim dicitur generaliter, et cum decernit, et cum iudicat qui iurisdictionem habet: Mistum imperium, quod magis est imperij quam iurisdictionis, species est eius iurisdictionis*'; *ibid.*, p. 83: '*Consequens est igitur ut iurisdictio, quae misto imperio inest, de re privata iurisdictio sit, quae decretis omnibus inesse recte dicitur*'; *ibid.*, p. 156: '*Quisquis habet iurisdictionem, idem hoc quoque imperium habet, de habente generalem iurisdictionem accepit: qualis est Praetor urbanus Romae, et Praeses in provincia*'. Cf. *ibid.*, p. 136.

<sup>56</sup> *Ibid.*, p. 154-155: '*Non enim ius dicit proprie qui decernit iudicium, sed imperat, ut per alium iudicantem, ipse ius dixisse videatur. Nam nec ipsa cognitio causae, iurisdictio est: sed ipsa pronuntiatio, et sententia magistratus, aut eius cui mandavit iurisdictionem: et hoc in civili negotio, quod propria legis actione ordinatur d. l. notionem de verb. sign. [D.50.16.99] Deinde ait [Cicero, ad Heren. I.1] de imperio misto. Et hoc quidem imperium ideo mistum dicitur, quia iurisdictioni admistum, et coniunctum est, pertinentque omnino ad officium ius dicentis: adeo ut quisquis habet iurisdictionem, hoc quoque imperium habeat; et qui hoc imperio utitur, ius dicentis officio fungi existimetur*'. See also *ibid.*, p. 161, '*Quod vero executionem sententiae, negat extremum esse iurisdictionis, supra a nobis refellitur: ubi ius dici non solum in constituendis iudicijs, et dandis iudicijs, sed in cognoscendo quoque, diiudicando causas privatas, et exequendo dictas iam sententias, ostendimus*'.

<sup>57</sup> *Ibid.*, p. 122: '*Bartolus iurisdictionem misto imperio inesse, ut genus inest speciei, non male scripsit: sed male tam generaliter accepit iurisdictionem, ut merum quoque imperium complectatur in misti imperij definitione*'. Cf. *ibid.*, p. 156. On the contrary, when considered in its narrow sense, for Baro *iurisdictio* was precisely Bartolus' *iurisdictio simplex*: '*huius imperij ea particula, quae in cognoscendis, iudicandisque privatis causis, et civilibus versatur, iurisdictio angustissima verbi huius significatione, appellata est*' (*ibid.*, p. 68; cf. also p. 71-72).

<sup>58</sup> The structure of the two works against Baro provides an interesting example of different approaches to the refined art of invective. Published in 1549, Duarenus' (short) reply commences with his reconstruction of *iurisdictio* and *imperium*. Each attack on Baro is aimed at strengthening his own theory, so that attack and defence are developed together. Once both are fully laid down, Duarenus focuses on the adversary in a crescendo of abuses (first on his Bartolian sympathies, then quite in general, just in case), *De iurisdictione et imperio apologia Fr. Douareni iur. adv. Eg. Baronem iurisconsultum*, in Id., *Opera Omnia*, Ludguni, apud Guliel. Rovillium, 1554, n. 18, fols. 73v-74r, and n. 19-20, fol. 74r-v respectively). By contrast, in his (remarkably long) *De Iurisdictione libri II, adversus Eguinarium Baronem*, Tolosae, apud Ioannem Molinerium, 1551, Goveanus neatly separates attack from defence. The first (and shorter) of his two books reports the most salient passages of Baro's work, in order to demolish every single line of it (*ibid.*, p. 1-12). The second (and considerably longer) book (p. 13-46) on the contrary focuses exclusively on Goveanus' own theory (see esp. *ad l. 3 [D.2.1.3]*, p. 23-24). Regrettably, Baro was indelicate enough to die during all this fun, so it fell to his disciple Edward Henryson to answer on his behalf, reaffirming Baro's views and detracting his opponents' (*Eduardi Herysonis, Pro Eg. Barone Adversus A. Goveanum de iurisdictione libri II*, Parisiis, apud Vincentium Sertenas, 1555).

Although he wrote his treatise while the controversy between Baro, Duarenus and Goveanus was at its apex,<sup>59</sup> Ludovicus Charondas (Louis Le Caron, 1534-1613) was careful not to take sides - at least openly. Probably, because he did not entirely agree with either of them. As usual, he argued that *iurisdictio* and *merum imperium* should be kept separate,<sup>60</sup> and that *iurisdictio* formed a unitary category with *mixtum imperium*.<sup>61</sup> However, unlike Baro, he did not qualify *mixtum imperium* as a species of the genus *iurisdictio*,<sup>62</sup> and unlike Duarenus and Goveanus he ascribed *merum imperium* to the *dictator* – not to the *praeses*.<sup>63</sup> The last point was particularly important: no magistrate holding *merum imperium* (that is, coercive powers) may also have *iurisdictio*.<sup>64</sup> Opting for the *dictator* instead of the *praeses* had its advantages. Ironically, Baro affirmed openly what both Duarenus and Goveanus had prudently left unsaid. So long as we focus on the *praetor urbanus*, then the distinction between *iurisdictio* and *merum imperium* holds. But if we look at the *praeses provinciae*, it is clear that he enjoys both.<sup>65</sup> Systematic expositions and strict adherence to the Roman sources have always proved to be poor bedfellows. Baro was attacked for his Bartolian deviations as much as for his efforts to systematise the unsystematisable.<sup>66</sup> Charondas simply avoided any generalisation, and so escaped much criticism.

Systematisation was dangerous and open to fierce attacks, and increasingly fewer humanist jurists ventured into general categories. But when they did, they moved carefully around the debris of previous intellectual wars. Although somewhat later than the group of legal humanist so far considered, Hugo Donellus (Hugues Doneau, 1527-1591) provides an excellent example of this, and of how attempts at laying out a general structure to our subject were not completely abandoned by authors *lato sensu*

<sup>59</sup> Ludovicus Charondas, *Charondae Iurisconsulti Parisiensis ... de iurisdictione et imperio libellus*, Parisiis, apud Ioannem Foucherium, 1553.

<sup>60</sup> Charondas accepted wholeheartedly the main tenets of Alciatus' reading and brought them to their ultimate consequences. The starting point was the *summa divisio* between *merum imperium* and *iurisdictio* (Charondas, *de iurisdictione et imperio libellus*, cit., n. 3-4, fols. 47v-48v). As *merum imperium* is exclusively concerned with *animadversio*, it may not take part in *iurisdictio*. By contrast, and simply enough, *iurisdictio* is '*licentia iuris dicendi*' (*ibid.*, n. 5, fol. 48v). *Iurisdictio* therefore stretches from the hearing of the controversy to its adjudication (*ibid.*, n. 8, fol. 51r). It follows that there is no need to neatly separate *cognitio* from *sententia*, for *iurisdictio* and *mixtum imperium* form a unitary and indivisible category (*ibid.*, n. 3-4, fols. 47v-48v). Even more, *mixtum imperium* is somewhat instrumental to *ius dicere* (*ibid.*, n. 20, fol. 59r). The old adage that '*iurisdictio sine modica coercitione nulla est*' does not imply the subordination of *iurisdictio* to *imperium*. Rather, it strengthens the indivisibility of *iurisdictio* and *mixtum imperium* (*ibid.*, n. 20, fols. 58r-59r). Also, the same principle further separates them from *merum imperium*: the kind of coercion which *merum imperium* requires is structurally different from the '*modica coercitio*' of *mixtum imperium*. *Missio in possessionem* and *gladii potestas* perfectly represent such a difference (*ibid.*, n. 22, fol. 60r).

<sup>61</sup> *Ibid.*, n. 15, fols. 55v-56r.

<sup>62</sup> Rather - although never openly - Charondas argued for the very opposite. He was particularly adamant in that *mixtum imperium* was not just the *modica coercitio* instrumental to the exercise of *iurisdictio*, but the sum of the standard jurisdictional prerogatives: *ibid.*, n. 17, fol. 56v and esp. n. 19-20, fols. 57v-59r. While formally distancing himself from Baro (e.g. *ibid.*, n. 4, fol. 48r-v), substantially Charondas reached similar conclusions. Just, for Charondas the general category was *mixtum imperium* and not, as in Baro, *iurisdictio*. But Charondas was prudent enough not to state as much openly.

<sup>63</sup> *Ibid.*, n. 14, fol. 54r-v.

<sup>64</sup> *Ibid.*, n. 15, fol. 55r-v.

<sup>65</sup> Baro, *Ad digesta iuris civilis l. de iurisdictione*, cit., p. 41.

<sup>66</sup> Even with regard to the prerogatives of the *praetor*, which in theory encompassed all *mixtum imperium*, Baro had to make an exception for *fideicommissa*, which belonged exclusively to the *consul*. Baro, *Ad τα πρώτα Digestorum*, cit., tit. 1, ad l. 11 [D 2.1.11], fol. 69v.

considered as legal humanists.<sup>67</sup> Unlike Baro, Donellus' work did not receive harsh critiques. And not just as his comment on *imperium* and *iurisdictio* was published posthumously.<sup>68</sup> But because Donellus looked exclusively at their application in Roman history - especially the Classical period. Nonetheless, it is easy to detect interesting parallels in between Donellus and some of the humanist jurists so far mentioned. After the usual definition of *merum imperium*<sup>69</sup> and the statements on the indivisibility of *iurisdictio* and *mixtum imperium*,<sup>70</sup> Donellus argued that, by and large, any form of *imperium* is *executio*.<sup>71</sup> If *iurisdictio* could not be divided from *mixtum imperium*, and *mixtum imperium* is ultimately *executio*, it follows that the magistrate with *iurisdictio* (the *praetor* first of all) has both *cognitio* and *executio*.<sup>72</sup> Further, while *iurisdictio* and *mixtum imperium* may not be separated, the ancillary function of the latter makes *iurisdictio* as the principal category among the two.<sup>73</sup> The dichotomy, observed Donellus, is between *iurisdictio* and *merum imperium*. But their structural difference does not necessarily entail their incompatibility: the same magistrate may well have both,<sup>74</sup> as - he argued - it is the case of the *praetor*.<sup>75</sup>

Later humanist jurists did not add much to the debate, which progressively became a highly specialised historical disquisition on magistrates in ancient Rome. Before this happened, however, the main features of the legal humanistic interpretation of jurisdiction were already neatly defined, and they might be summed up in broad terms. *Merum imperium* was utterly marginalised, largely to the benefit of *mixtum imperium*. The same *mixtum imperium* was increasingly considered as inseparable from *iurisdictio*, for without some degree of coercion *ius dicere non potest*. The distinction between private and public utility was largely rejected,<sup>76</sup> as well as that between *iudex nobilis* and *mercenarius*.<sup>77</sup> As such, the hierarchy among the three components of the

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<sup>67</sup> Donellus is a fine example of the plurality of distinct scholarships grouped together under the *mos gallicus* umbrella. Donellus' work was probably the first great systematic re-arrangement of all Civil law. In order to include him among legal humanists, it was necessary to add systematisation to the main aims of humanist jurists. As it happens, few things are more remote from legal humanism than systematisation.

<sup>68</sup> Donellus' work on *iurisdictio* and *imperium* was published only in 1596 as part of the seventeenth book of his *Commentarii* by Scipio Gentili. I have however opted for Hilliger's edition (*Donellus Eucleatus*, originally published in two volumes, the first in 1611 and the second in 1613, both at Jena) in the neat and carefully edited edition printed at Lucca in between 1762 and 1777.

<sup>69</sup> Hugo Donellus, *Opera Omnia*, vol. IV, Lucae, 1764, lib. 17, ch. 8, n. 20-21, cols. 1142-1149.

<sup>70</sup> *Ibid.*, book 17, ch. 8, n. 14-15, cols. 1130-1134.

<sup>71</sup> *Ibid.*, book 17, ch. 8, n. 21, col. 1146: '*imperium in universum dici exsequendi potestatem, efficiendique, ut ratum sit, quod magistratus statuerit.*' Cf. also *ibid.*, n. 15, col. 1133.

<sup>72</sup> *Ibid.*, book 17, ch. 6, n. 5-7, cols. 1087-90; cf. *ibid.*, ch. 7, n. 7, cols. 1103-1105, and n. 15-16, cols. 1113-1116.

<sup>73</sup> '*Sed quia iurisdictio natura prior est, quam imperio adiuncto confirmari oportet, idem, magis imperium iurisdictioni accedere, eique cohaere, et misceri videtur,*' *ibid.*, book 17, ch. 8, n. 14, col. 1131. Cf. more broadly the whole cols. 1130-1134.

<sup>74</sup> '*Isto modo et merum imperium dictum, quod alterius rei misturam non habet, solum et per se imperium. Sed nondum id dicimus; quod res est. Nam si id ista infinite et generaliter dicatur, certe falsum sit potestatem animadvertendi in facinorosos esse imperium merum, seu non mistum. Quaecumque enim haec potestas est, coniuncta est cum cognitione,*' *ibid.*, book 17, ch. 8, n. 21, cols. 1146-1148.

<sup>75</sup> *Ibid.*, ch. 8, n. 23, col. 1151.

<sup>76</sup> Even those jurists, such as Donellus, who retained it did so within an entirely different framework from the traditional *ius commune* one: *ibid.*, ch. 7, n. 5, col. 1101.

<sup>77</sup> While rejecting it in principle, this division often resurfaced among legal humanists, chiefly because of the temptation to identify the *iudex nobilis* with the *praetor*, and the *mercenarius* with the *iudex pedaneus*. But this simply added fuel to the scholarly debate, for it triggered endless disputes on whether the *iurisdictio* of the *praetor* had to be narrowed down to the simple *datio iudicis*, or whether the *praetor*

Accursian notion of *iurisdictio* was turned entirely upside-down. *Mixtum imperium*, inextricably linked to *iurisdictio*, was now the most important of the three categories, encompassing the vast majority of jurisdictional functions. Beyond this, each legal humanist had different ideas on both definition and scope of the three categories, especially *iurisdictio* and *mixtum imperium*. 'Pure' *iurisdictio* was especially tantalising, as well as the issue of which specific prerogatives should fall into *mixtum imperium*, and why.

iv. In the Euripidean tragedy, the gods had the good sense of intervening one at time. Legal humanism suffered from an overpopulated Olympus. All of a sudden, lawyers were faced with a number of different and mutually-contradicting theories, all of which could however claim stronger links with the Roman sources than the traditional *ius commune* one. Whatever the defects of the tradition, the avalanche of new theories had a deeply destabilising effect. In a few decades, the entire subject of *iurisdictio* became extremely confusing. In the words of Ioannis Bologneti (Giovanni Bolognetti, 1506-1575), 'such a variety of opinions created a huge confusion in the meaning of the law'.<sup>78</sup> Similar comments became so frequent that it would be pointless (and probably impossible) to list them in full.<sup>79</sup>

The later *ius commune* production is typically considered as exceedingly practical-minded and hardly interested in general and theoretical discussions. This is true to some extent. For even the most pragmatically-oriented (or plainly casuistic) lawyers clearly relied on the Bartolian scheme. To give an extreme example, in the 252 pages of his *consilia* devoted to *iurisdictio*, the famed jurist De Luca never once discussed the Bartolian categories. But he always presupposed them.<sup>80</sup>

Commentators had always tested the Bartolian jurisdictional scheme, from Baldus to the very eve of the legal humanist attack.<sup>81</sup> But those discussions always occurred

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could actually hear the case and pronounce the judgment by himself and, in such a case, whether the *iudex pedaneus* could be said to *ius dicere* at all and, if not, how to define his jurisdictional role.

<sup>78</sup> 'Ista varietate opinionum causatur confusio magna in intellectu legis', Ioannis Bologneti, *In primam Digesti veteris repetitiones*, Neapoli, apud Raymundum de Amato, 1558, ad D.2.1.3, n. 1, fol. 187r.

<sup>79</sup> One might even move of a few decades a time and list the similar complaints he finds published then. So, for instance, about forty years after Bologneti, the extensive commentary of Delrio and de Brosses read, sub D.2.1: 'Mansit res per se satis aperta incertior quam antea, saepe nimirum litigando veritas amittitur' (Martin Antonio Delrio and Pierre de Brosses, *Ex Miscellaneorum scriptoribus digestorum sive pandectarum iuris civilis interpretatio, index authorum atque Scriptorum miscellaneorum; Index Titulorum Pandectarum*, 2<sup>nd</sup> edn., Ludguni, apud Franciscum Fabrum, 1590, ad D.2.1, col. 74). Again, forty years later, Lindenspür remarked 'tam incertae autem hodie sunt de iurisdictione opiniones, variaeque consuetudines ac observantiae, totaeque eius species, quas aut usus, aut necessitas, aut quantoque adulatio peperit' (Georg Ludvich Lindenspür, *Dissertatio de successionibus ac mutationibus imperiorum ac familiarum*, Ingolstadii, Typis Gregorii Haenlini, 1638, p. 97, n. 2).

<sup>80</sup> Giovanni Battista de Luca, *Theatrum Veritatis et Justitiae*, lib. 3, pt. 1, *De iurisdictione et foro competenti, Coloniae Agrippinae, Sumptibus Societatis*, 1691. De Luca is hardly an isolated example: see e.g. Federico Scotti, *Consilia seu Responsa*, Venetiis, apud Vincentium Valgrisiunum, 1572, vol. I, lib. 3, resp. 13, n. 1 and 3, p. 251; vol. II, lib. 6, resp. 22 and 38, fols. 24v-25r and 39r-40r respectively, and lib. 8, resp. 5, fols. 122r-123v; Marco Antonio Natta, *Consilia*, 1588, Francofurti ad Moenum, impensis Signis. Feyerab. (1<sup>st</sup> edn. 1558, Lyon), vol. I, cons. 82, n. 6-8, fol. 64r; vol. II, cons. 405, n. 1-3, fol. 107r-v; Giovanni Battista Saminiati, *Controversiae Forenses*, Genuae, sumptibus Antonii Georgii Franchelli, 1686, contr. 24, n. 20, p. 306; contr. 96, n. 24-26, p. 801; contr. 99, n. 33, p. 817.

<sup>81</sup> E.g. Filippo Decio, *Commentaria in Digesti Vete[ri] et Cod[ici]*, Ludguni, 1567 (1<sup>st</sup> edn. 1523, Venice), ad D.2.1.1, § *Ius dicentis*, n. 10, fol. 25r. Possibly one of the last authors who questioned the Bartolian scheme without mentioning the humanist jurists was Gian Girolamo Albani, *Lucubrationes ad*

within the Accursian gloss, never against it. Now, for the first time, it became vital to defend the very grounds on which the entire jurisdictional framework was built. From the second half of the sixteenth century, when a work touched upon the subject of jurisdiction only in passim it usually adhered to the Bartolian scheme in a few lines and quickly moved on.<sup>82</sup> Other times it simply avoided the whole issue.<sup>83</sup> But when a treatise was devoted (in full or in part) to the subject of jurisdiction, it typically looked at the Bartolian scheme with a significant (humanistic) attention to the sources, in order to defend it.<sup>84</sup>

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*Bartolum*, Venetiis, 1571, *ad De iurisdictione omn. Iud.*, fols. 73r-75v, and *ad summarium in l. imperium*, fol. 76r.

<sup>82</sup> E.g. Johann Oldendorp, *Loci Communes Iuris Civilis*, Ludguni, apud Seb. Gryphium, 1545, § *Iurisdictio*, p. 173; Marco Bassanello, *Colloquia, seu dialogi*, Venetiis, ex officina Erasmiana, Vincentii Valgrisi, 1553, dialogue 23, p. 55-56, and dialogue 97, p. 211; Sebastian Brant, *Titulorum omnium iuris tam civilis quam canonici Expositiones*, Ludguni, apud Seb. Gryphium, 1553, *ad D.2.1.2, de iurisdictione omnium iudicium*, p. 16; Bernhard Wurmser, *Practicarum Observationum*, Basileae, per Thomam Guarinum, 1570, lib. 1, *de Iudicibus*, n. 15, p. 6-7; Hartmannus Hartmann, *Practicarum Observationum*, Basileae, per Thomam Guarinum, 1570, lib. 2, *De Iudiciis*, esp. n. 6, p. 177, and n. 16, p. 183; Dethar Horst, *Synopsis Thesium sive Axiomatum Iuris, ad primam partem Pandectarum seu Digestorum Iuris Civilis Romani*, Helmstadii, excudebat Iacobus Lucius Transylvanus, 1583, *ad D.2.1*, n. 1-4; Alessandro Turamini, *Commentarii*, Florentiae, apud F. Tosium, 1592, lib. 3, ch. 2, n. 38, p. 138; Tiberio Deciani, *Responsorum*, Venetiis, apud Vassallinum, 1602, vol. IV, resp. n. 40, n. 2-3, p. 168v, n. 21-23, fol. 170v, and n. 47, fol. 172v; Giulio Pace, *Synopsis Iuris Civilis*, Argentorati, sumptibus Lazari Zetzneri Bibliopol, 1607, lib. 2, n. 1, p. 15; Id., *Methodica ad Iustinianum Codicem*, Ludguni, 1606, lib. 3, tit. 13, ch. 1, n. 4-6, p. 190, ch. 2, n. 2-4, p. 192; ch. 3, n. 23-24, p. 192-193; ch. 4, n. 31-32, p. 194; Marco Antonio Mureti, *In titulos ad Materiam Iurisdictionis Pertinentes Commentarii*, Francofurti, sumptibus ac typis Ioannis Bringeri, 1615, esp. p. 139-140; Ettore Capecelatro, *Selectiorum Consultationum iuris*, Neapoli, typis Iacobi Gassari, sumptibus Io. Dominici Bove, 1643, lib. 1, cons. 41, n. 9, p. 314.

<sup>83</sup> This attitude had apparently little to do with the importance of the work or of the author, for it is attested among some of the most celebrated writings as much as in the less known ones: e.g. Prospero Farinacci, *Praxis et Theoricae Criminalis*, Ludguni, sumptibus Iacobi Cardon, 1634, vol. I, pt. 1, q. 7, p. 58-75 (on the subject of the *iudex incompetens*); Marco Antonio Peregrino, *De iurisdictione Ordinaria et Delegata*, in Id., *Tractatus varii*, Venetiis, apud Nicolaum Polum, 1611; Cristopher Cuppener, *Commentarii*, Francofurti, typis Matthiae Beckeri, 1605, p. 118-119; Erasmo of Chokier, *Tractatus Iurisdictionis Ordinariae in Exemptos*, Coloniae Agrippinae, apud Joannem Kinckium, 1624, p. 355, n. 4.

<sup>84</sup> Among the enormous production of the late sixteenth and early seventeenth centuries see e.g. Jean Brèche, *Ad titulum pandectarum De Verborum & rerum significatione Commentarii*, Ludguni, apud Ioannem Temporalem, 1556, *ad D. 50.16.215*, § *Potestatis verbo*, p. 431-433, esp. n. 4, p. 432-433; Johannes Althusius, *Iuris Romani Libri duo*, Basileae, ad Lecythum Waldkirchianam, 1586, lib. 1, ch. 8, p. 18; Pierre Du Faur de Saint-Jorry (Petrus Faber), *ad Tit. de Diversis Regulis Iuris antiqui [...]* *Commentarius*, Ludguni, apud Franciscum Fabrum, 1590, *ad D.50.17.70*, n. 7-10, 14-15, 18-20, 23-27 and 36, p. 179-184; Ludovico Carboni, *Tractatus de legibus*, Venetiis, apud Ioannem Guerilium, 1599, lib. 11, disp. 10, p. 497-501; Tobias Paurmeister, *De iurisdictione imperii Romani libri II*, Hanoviae, Impensis Petri Kopffii, 1608, ch. 7-9, n. 1, p. 49-56, and esp. ch. 9, p. 56-67; Orazio Marta, *Tractatus de iurisdictione inter iudicem ecclesiasticum et laicum exercenda*, Moguntiae, ex typographia Iohannis Albini, 1609, vol. I, pt. 1, ch. 8, n. 1-3 and 5-7, p. 19; Marco Antonio Mureti, *In titulos ad Materiam Iurisdictionis Pertinentes*, Francofurti, sumptibus ac typis Ioannis Bringeri, 1615, p. 139-140; Helfrich Ulrich Hunnius, *De iurisdictione tractatus*, Giessae, Typis Casparis Chemlin, 1616, esp. pt. 1, ch. 1, n. 1-2, p. 22-25, and ch. 2, q. 3, p. 70-71; Camillo Borrello, *De Magistratuum edictis*, Francofurti ad Moenum, typis Hartmanni Palthenii, sumptibus Haeredum D. Zachariae Palthenii, 1621, lib. 1, ch. 17, n. 24-32, p. 235-237; Hermann Vultei, *Commentarius at tit. Codicis, qui sunt de iurisdictione et foro competenti*, Francofurti, sumptibus Godefridi Tampachij, 1630, *ad C.3.13*, n. 4-12, p. 10, and n. 79, p. 48; Jacob Brinkmann, *Dissertatio ad vexatissimam l. de iurisdictione*, Jenae, typis Viduae Weidnerianae, 1631, thesis 1, n. 2-4, 6-7, 9-10, 16, 25-32. Special mention should also be made of the number of *lexica iuridica* printed between the late sixteenth and the early seventeenth century - often the most

A particularly vehement apology of the Bartolian categories was that of Hieronymus Muscornius (Hieronimo Muscornio). Muscornius allowed only for minor corrections to the traditional interpretation of the *lex imperium*,<sup>85</sup> which he shielded with many 'counter-quotations' from classical sources,<sup>86</sup> as well as with some new interpretations of Latin terms. In particular, he stressed that the verb '*animadvertere*' is a neuter term, since it just means '*vertere animum, atque mentem*'.<sup>87</sup> As such, it may not be used in a narrow sense. The *animadversio in facinorosos homines* of Ulpian in D.2.1.3, therefore, does not mean that *merum imperium* is confined to the execution of criminal punishments. Rather, and precisely after Bartolus, for Muscornius *merum imperium* is *suprema potestas*.<sup>88</sup>

Muscornius' somewhat drastic attempt was a relatively isolated case. Especially on *merum imperium*, most jurists tended to agree with legal humanists. '*Merum*' meant '*purum*', not '*summum*', and as such it had to be relegated to criminal disputes.<sup>89</sup> Complete repudiation of legal humanist critiques did not prove successful: some compromises had to be made. Significantly enough, narrowing *merum imperium* to criminal proceedings was the main concession to legal humanism that a jurist as important and representative of the later *ius commune* as Iacobus Menochius (Jacopo Menochio, 1532-1607) could allow. Menochius stated as much at the very beginning of his treatise on *iurisdictio*.<sup>90</sup> Apart from that, however, he fully adhered to the traditional Bartolian scheme,<sup>91</sup> stressing in particular the concept of *imperium* as a unitary category.<sup>92</sup> No matter how Haloander's edition of the Digest would read, for Menochius *iurisdictio* clearly came from *iuris-ditio*, as attested in a number of classical sources, ranging from Cicero to Virgil.<sup>93</sup> Menochius' use of classical texts is revealing of an extremely widespread attitude. On a superficial level, it betrays the effort of many lawyers to pay back legal humanists' attacks in kind.<sup>94</sup> More deeply, however, it attests

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representative of the market (and so of the interest of lawyers at large). They typically build on the Bartolian systematisation with significant openings to the new humanist interpretation.

<sup>85</sup> Hieronymus Muscornius, *Tractatus de Iurisdictione atque imperio*, Coloniae Agrippinae, in Officina Ioannis Gymnici, 1596. On the Bartolian scheme in general see esp. n. 12, p. 5, and n. 18, p. 8-9; on the distinction between private and public utility see n. 63-66, p. 56-68, and n. 78-79, p. 75-76; on the subject of *mixtum imperium* see in particular n. 31, p. 21-22, n. 145, p. 144, n. 149-156, p. 150-156, and n. 158-163, p. 156-161.

<sup>86</sup> *Ibid.*, esp. n. 4-16, p. 2-7; n. 33, p. 23, n. 36, p. 25, n. 38, p. 28.

<sup>87</sup> *Ibid.*, n. 44, p. 35.

<sup>88</sup> *Ibid.*, esp. n. 31, p. 21-22 and n. 38, p. 28. Cf. also n. 36, p. 25. The distinction between *cognitio* and *animadversio* is similarly dismissed through the example of the *quaestores*, who enjoyed both: *ibid.*, n. 14, p. 7.

<sup>89</sup> E.g. Hunnius, *De iurisdictione tractatus*, cit., pt. 1, ch. 1, quaest. 4, n. 1, p. 39-40; Horst, *Synopsis*, cit., ad D.2.1, n. 5, p. 48; Althusius, *Iuris Romani Libri duo*, cit., lib. 1, ch. 8, p. 18; Carboni, *Tractatus de legibus*, cit., lib. 11, disp. 10, p. 497-498; Marta, *Tractatus de iurisdictione*, cit., vol. I, pt. 1, ch. 36, n. 10-12 and 25-26, p. 110-111.

<sup>90</sup> Iacobus Menochius, *De imperio et iurisdictione commentarii posthumi, duobus libris expositi*, Francofurti, sumptibus Danielis et Davidis Aubriorum, et Clementis Schleichii, 1622, lib. 1, ch. 1, p. 2. See further ch. 5, n. 4, and esp. n. 17, p. 53-54. Cf. also ch. 5, n. 18-20, p. 54-56 (on the scope of *merum imperium* in the Roman sources), ch. 15 [q. 8], n. 2-3, p. 134-135 (on fines), and ch. 16 [q. 9], n. 2-6, p. 145-147 (on confiscation).

<sup>91</sup> *Ibid.*, lib. 1, ch. 1, n. 1-3, p. 2-4. In particular, Menochius approved of the two-fold Bartolian notion of *iurisdictio* as genus and species (*ibid.*, ch. 1, n. 4-9, p. 4-8, and ch. 2, n. 1-2, p. 10-11, n. 9-10, p. 15-16, n. 23, p. 23-24; ch. 3, n. 1, p. 27, n. 5, p. 29-30).

<sup>92</sup> *Ibid.*, lib. 1, ch. 7, n. 2, p. 85.

<sup>93</sup> *Ibid.*, lib. 1, ch. 2, n. 25-26, p. 24-26.

<sup>94</sup> One of the most draconian examples in this direction was the *Lexicon iuridicum* of Sichardus, who went as far as accusing Ulpian of having 'usurped' the concept of *iurisdictio* ('*Iurisdictionis verbum ab Ulpiano in d. l. imperium [D.2.1.3] stricte et anguste usurpari*'), narrowing down a much broader



to the growing interest for a meticulous examination of the sources also among Bartolists (who otherwise would have not felt the need to answer to the humanist jurists' critiques in the first place). If a word or a concept was attested in classical sources, legal and extra-legal alike, it gave weight to the legal argument. Even a Bartolist as orthodox as Muscornius insisted on the importance of interpreting Latin terms according to the sources, not to their modern usage.<sup>95</sup> Thus, behind the curtain of endless debates on the exact meaning of legal terms in the classical sources, there lay practical consequences - not philological appetites.<sup>96</sup> By the eve of the seventeenth century no systematic treatise dealing with jurisdictional issues could avoid long digressions into historical and philological discussions. Unfaithfulness to Roman sources became progressively a clear sign of being plainly wrong. As a consequence, many jurists paid increasing attention to the exact terminology used in Roman sources. Yet, attention to the sources always remained a means, not an end. The end was more practical: grounding current legal issues into *ius commune* categories - and solving them accordingly.<sup>97</sup>

Apart from Menochius and Muscornius, the most important (and quoted) among the treatises seeking to conciliate Bartolism with the main critiques of legal humanism opted for very elaborated schemes. While apparently detaching themselves from the Bartolian orthodoxy, such treatises ultimately aimed at protecting the traditional jurisdictional framework. Among them, mention should be made of at least three: those of Bologneti, Obrecht and Bocerius.

Bologneti divided *iurisdictio* and *imperium* in three different categories (legislative, jurisdictional and equitable),<sup>98</sup> according to their object.<sup>99</sup> Then, he divided the jurisdictional category into *actio* and *persecutio*, *actio* corresponding to (jurisdictional) *iurisdictio*, and *persecutio* to (jurisdictional) *imperium*. In turn, and lastly, (jurisdictional) *persecutio* was segmented into *criminalis* and *civilis* after the divide

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category (i.e. that of *iuris-ditio*). Simon Sichardus, *Lexicon iuridicum*, Coloniae Agrippinae, apud haeredes Iohannis Gymnici, 1600, § *imperium*, p. 437.

<sup>95</sup> 'Verba quando latine concipiuntur esse semper interpretanda secundum latinos, et non vulgares homines'. Muscornius, *Tractatus de Iurisdictione atque imperio*, cit., n. 22, p. 11. Muscornius' insistence on the correct interpretation of the sources derived from his view of legal humanism as a degeneration of philology applied to the law. In his view, the fallacy of humanist jurists lay in their exasperate attention to the abstract meaning of a word, extrapolated from its broader – and *legal* – context.

<sup>96</sup> For example, one of such debates focused on the exact meaning of the key-word '*animadvertere*'. In order to prove that *merum imperium* consisted of both *cognitio* and *executio*, Bologneti divided the phrase '*animadver[sio] in facinorosos homines*' of D.2.1.3 in two parts. *Animadversio* stood for *cognitio*, whereas its application '*in facinorosos homines*' represented the *executio*. Bologneti, *In primam Digesti veteris repetitiones*, cit., ad D.2.1.3, n. 26, fol. 190r. In order to achieve the same result with somewhat sounder arguments, Bocerius looked at many classical sources, and concluded that *animadversio* was used both in the sense of *cognoscere* and *coercere*. Henricus Bocerius, *Disputatio de iurisdictione*, Tubingae, typis Georgij Gruppenbachij, 1597, n. 14, let. a-c, p. 15. Such a conclusion was harshly criticised by Hunnius, *De iurisdictione tractatus*, cit., pt. 1, ch. 1, q. 3, n. 3, p. 31-32, who pointed that in legal Roman sources (as opposed to extra-legal ones) its meaning was only that of *coercere*.

<sup>97</sup> For instance, when commenting on *de in ius vocando* (D.2.1.4) Petrus Costalius (Pierre Coustau) introduced the subject with Duarenus' definition. But then he moved on, perfidly (but lucidly) noting how '*nos qui iure pro ratione utimur, opinor, tantam scrupulositatem non servamus*' (Costalius, *Ad XXV Libros Priores Pandectarum Adversaria*, Coloniae, apud Ioannem Kreps, 1627, p. 76).

<sup>98</sup> More correctly, *statutaria* ('*iurisdictio condendi iura quam ego appello statutariam*'), *iuditiaria* ('*iurisdictio redendi iura vel ius dicendi seu administrandi iustitiam quam ego appello iuditiariam*'), and *gratiosa* ('*iurisdictio equitatis statuendi et gratias faciendi et dispensandi quam ego appello gratiosam*'). As such, *iurisdictio gratiosa* was somewhat broader than equitable jurisdiction, as it also encompassed pardons. Bologneti, *In primam Digesti veteris repetitiones*, cit., ad D.2.1.3, n. 4, fol. 177r.

<sup>99</sup> *Ibid.*, n. 4-6, and n. 10, fols. 187v-188r.

between *merum* and *mixtum imperium*. This way (jurisdictional) *persecutio criminalis* would correspond to *merum imperium*, and (jurisdictional) *persecutio civilis* to *mixtum imperium*.<sup>100</sup> In this new and complex scheme the old Accursian classification became more tenable, as Bologneti was effectively moving elsewhere any segment of medieval *iurisdictio* not attested in the sources.<sup>101</sup> Moreover, Bologneti's scheme could better support the Bartolian division between private and public utility - which he felt was not close enough to the sources - and also that between noble and mercenary judges.<sup>102</sup> For both divisions would now refer only to jurisdictional *iurisdictio* and *imperium* - and not also to the legislative and equitable ones.<sup>103</sup>

Georgius Obrecht (Georg Obrecht, 1547-1612) sought to defend the Accursian notion of *iuris-ditio* by classifying *iurisdictio* as a conceptual category (*notio*), and not - as in Bartolus - a proper power (*potestas*).<sup>104</sup> This way, *iurisdictio* could still be used in its broadest possible meaning but, in accordance with the sources, it was now wholly separated from *imperium* (which on the contrary remained *potestas*).<sup>105</sup> The extreme breadth of the term '*notio*' lent itself perfectly to both meanings in which Bartolus used *iurisdictio*, an all-encompassing genus and a narrow category.<sup>106</sup> In order to further separate *iurisdictio* from *imperium*, Obrecht stressed the closeness between *imperium merum* and *mixtum*, naming them '*plenum*' and '*minus plenum*' respectively.<sup>107</sup> Within *mixtum imperium*, Obrecht further distinguished between those prerogatives which were strictly instrumental to the exercise of *iurisdictio* and those which were not.<sup>108</sup>

In comparison with Bologneti's and Obrecht's theories, that of Henricus Bocerius (Heinrich Bocer, 1561-1630) might look disharmingly simple. Bocerius fully accepted the new interpretation of humanist jurists, but divided *iurisdictio* in two kinds - *ordinaria* and *specialis*. *Ordinaria iurisdictio* corresponded to Bartolus' *iurisdictio simplex* together with a few prerogatives traditionally pertaining to *mixtum imperium*,<sup>109</sup> whereas *specialis iurisdictio* grouped all those prerogatives more strictly associated with *coercio* than *cognitio*.<sup>110</sup> We will return to all these theories soon enough.

<sup>100</sup> *Ibid.*, n. 14, fol. 188v.

<sup>101</sup> *Ibid.*, n. 2 and 8-9, fols. 187v-188r, and esp. 23-24, fol. 189v, n. 55-56, fol. 196r-v, n. 60-63, fols. 197r-198r.

<sup>102</sup> *Ibid.*, n. 11-13, fol. 188r-v.

<sup>103</sup> *Ibid.*, n. 15, fol. 188v. Having fully explained his new scheme, Bologneti used it to shield the Bartolian classification from the main critiques of humanist jurists, meticulously listed, explained and dismissed one by one: *ibid.*, n. 45-116, fols. 194v-208v.

<sup>104</sup> Georgius Obrecht, *Disputatio de Iurisdictionis et Imperii Principiis*, Argentinae, 1589, thesis 88.

<sup>105</sup> *ibid.*, esp. theses 182-185. Specifically, Obrecht defined *imperium* as 'the power to give orders, to which one must obey' ('*imperium non male definiri videtur, iubendi potestas, cui parere necesse est*', *ibid.*, thesis 193).

<sup>106</sup> *Ibid.*, thesis 74: '*dicitur notio: quia hoc vocabulum generale est, et tam cognitionem, quam iuris dictionem significat.*' When this *notio* was considered in its broadest meaning, then it encompassed both *imperium* and *iurisdictio (simplex)*: '*latissime considerata definiri potest notio criminalium et civilium causarum, quae vel lege vel iure magistratus competit, et cui interdum imperium cohaeret*', *ibid.*, thesis 73; cf. also thesis 36.

<sup>107</sup> *Ibid.*, theses 223-225.

<sup>108</sup> *Ibid.*, theses 351-352 and 353-356 respectively.

<sup>109</sup> Mainly, *in integrum restituere* and *bonorum possessio*: Bocerius, *Disputatio de iurisdictione*, cit., n. 4, let. a-e, p. 3.

<sup>110</sup> '*Specialis iurisdictio in iubendo consistere dicitur, quae ad dirimendam civilem controversiam, iubendo et imperando magis quam cognoscendo expeditur*,' *ibid.*, n. 7, p. 5. See further *ibid.*, n. 6, let. a-f, p. 4-5, and n. 9, let. c, p. 7.

V. I have said earlier that many non-humanists considered historical and philological debates as important digressions which however were not the ultimate aim of their work. This seems to imply that 'proper' humanist jurists on the contrary regarded history and philology as an end to itself. Doubtless, some of them did. But the historian should always look with suspicion at 'purely' cultural struggles. The *lex imperium* was the cornerstone of the *ius commune* notion of authority. Deconstructing it, legal humanists attacked the legal foundations of centralised power. Just ten years after Alciatus' *Paradoxa*, the ultimate two consequences of the new approach were clearly outlined by Longovallius, and then shared by most humanist jurists.

First and foremost, *imperium* (be it *merum* or *mixtum*) was hardly the province of political authority. It pertained exclusively to the judge.<sup>111</sup> *Merum imperium* was extremely narrow, just *mera coercio*, and its scope was limited to the execution of criminal judgments.<sup>112</sup> The power to legislate (the highest example of *merum imperium* for the Bartolists) therefore could not be grounded on *merum imperium*.<sup>113</sup> *Mixtum imperium* and *iurisdictio* on the other hand were to be interpreted with exclusive regard to the jurisdictional sphere. It followed that the prerogatives ascribed to *mixtum imperium* or *iurisdictio* did not compete to political authorities (first of all the prince), but only to the judges.<sup>114</sup>

Secondly, and to our purposes even more importantly, the new approach had profound repercussions on delegated jurisdiction. The Digest was quite clear in that jurisdictional prerogatives pertaining to private controversies could be delegated, whereas any prerogative especially conferred by the law could not.<sup>115</sup> As such, it was not possible to delegate *merum imperium*, whereas *mixtum imperium* (since *iurisdictio coeherens*) could be freely delegated.<sup>116</sup> At this point the insistence of most legal humanists on *mixtum imperium* as an all-encompassing category and on the marginality of *merum imperium* may be fully appreciated. The Accursian Gloss interpreted the Roman text as allowing to delegate only *iurisdictio simplex* and what parts of *mixtum imperium* were instrumental to its exercise.<sup>117</sup> Bartolus' systematisation added weight to this, for an obvious corollary of the basic distinction between *iudex nobilis* and *mercenarius* was that no prerogative belonging to the *nobilis* could be entrusted to the latter.<sup>118</sup> The

<sup>111</sup> Longovallius, *Nova et facilis declaratio*, cit., pt. 3, fol. 23v. Cf. Gillotus, *De iurisdictione et imperio libri duo*, cit., pt. 2, ch. 19, fol. 15r.

<sup>112</sup> Longovallius, *Nova et facilis declaratio*, cit., pt. 3, fol. 20v: '*imperium nihil aliud quod coer[ci]tionem et summam potestatem esse existimo*'.

<sup>113</sup> '*Meo iudicio non longe abest a veritate, nimirum, statuta condere, legitimare et multa alia non esse imperii, aut iurisdictionis, quia a non habentibus imperium aut iurisdictionem possunt exerceri*', *ibid.*, pt. 3, fol. 23v. Cf. Gillotus, *De iurisdictione et imperio libri duo*, cit., pt. 2, ch. 20, n. 2, fol. 15v, and esp. ch. 21, n. 1, fol. 16r; Charondas, *de iurisdictione et imperio libellius*, cit., n. 11 and 13-15, fols. 53r-56r.

<sup>114</sup> Longovallius, *Nova et facilis declaratio*, cit., pt. 3, fol. 22v. Cf. Lorientus, *De iurisdictione et imperio*, cit., axioma 4, col. 4; Charondas, *de iurisdictione et imperio libellius*, cit., n. 7-8 and 10, fols. 50r-v and 51v-52r respectively.

<sup>115</sup> D.1.21.1pr.

<sup>116</sup> D.1.21.1.1. On the subject see T. Spagnuolo Vigorita, '*Imperium mixtum. Ulpiano, Alessandro e la giurisdizione procuratoria*', in *Index. Quaderni Camerti di Studi Romanistici* 18 (1990), p. 113-166, esp. p. 125.

<sup>117</sup> Accursius, *Digestum vetus*, cit., ad D.2.1.3, § *Mixtum*, cols. 164-165.

<sup>118</sup> Bartolus de Sassoferrato, *Super prima et secunda parte Digesti veteris*, cit., ad D.1.21, § *Quecunque*, n. 1-8, p. 101-102, and ad D.2.1.3, § *Imperium*, n. 1, p. 111-112. Bartolus' reading of the Accursian Gloss reduced even more the (already narrow) scope of *iurisdictio delegata*. Now, only the lowest kinds of *imperium* could be delegated to *magistratus municipales*: *ibid.*, § *Imperium*, n. 12 and n. 21-22, p. 113. Not even the whole *iurisdictio simplex* (or rather, those kinds which could be heard by a *iudex mercenarius*: *supra*, note 10) could be delegated, but only the lower groups of its six-fold division: *ibid.*, § *Imperium*, n. 25-26, p. 113-114.

*magistratus municipales*, therefore, had neither *merum* nor *mixtum imperium*, so that 'they could judge only about the lowest cases.'<sup>119</sup> By the eve of the sixteenth century, the orthodox position had not changed among jurists. It was not possible to delegate to the *magistratus civiles* even those prerogatives which pertained to the *iudex nobilis* for the sake of private utility - let alone public.<sup>120</sup> It may be recalled how legal humanists agreed with Alciatus in dismissing the distinction between *iudex nobilis* and *mercenarius* and that between private and public utility, as well as in relegating *merum imperium* to capital punishments. The assimilation of *mixtum imperium* with *iurisdictio* (or rather their inseparability) was the last step towards the full delegability of judicial prerogatives to lower magistrates.<sup>121</sup> Also in this respect it was Longovallius who first brought Alciatus' arguments to their ultimate consequences: unlike *merum*, *mixtum imperium* may be fully delegated.<sup>122</sup> For once, most of legal humanists wholeheartedly agreed.<sup>123</sup>

<sup>119</sup> *'Magistratus municipales cognoscunt de vilibus tantum causis'*, *ibid.*, n. 1, p. 101.

<sup>120</sup> E.g. Jason de Mayno, *Commentaria in primam partem Digesti veteris*, Papiae, 1500, *ad* D.2.1.2, § *Cui iurisdictio*, and especially his ponderous *lectura ad* D.2.1.3, § *Imperium*.

<sup>121</sup> It is interesting to observe how the same statement of Paul (as reported by Papinian in D.1.21.1.1 - *mixtum imperium* may be delegated so long as instrumental to the exercise of *iurisdictio*) was the basis for two completely different interpretations. Of the two, perhaps the Commentators' one was more faithful to the text - though not entirely so. Moving from the Accursian Gloss, they looked at those aspects of *mixtum imperium* strictly instrumental to *iurisdictio simplex*. The obvious conclusion was that only a little part of the prerogatives of *mixtum imperium* could be delegated. Yet, when summing up their conclusions, they detached themselves from the text: the only prerogatives fully delegable were those of the *iudex mercenarius*. By contrast, legal humanists stressed the link between *iurisdictio* and *mixtum imperium* so to insist on the latter's full delegability. But, apart from Baro, they typically shunned the full assimilation of *iurisdictio* with *mixtum imperium*. As a consequence, they usually jumped to the conclusion that, since *mixtum imperium* contained the *modica coercitio* needed to exercise *iurisdictio*, it was fully delegable. Clearly, this leap forward entirely begged the question: does all *mixtum imperium* consist of *modica coercitio* instrumental to the exercise of *iurisdictio*? The answer was obviously negative. Hence, after having boldly stated that all *mixtum imperium* may be delegated (as *iurisdictio coaeherens*), they hastily went back a step or two and identified some kinds of *mixtum imperium* totally unrelated to *iurisdictio*, singling them out as exceptions to the rule. A remarkable exception to this *modus operandi*, however, may be found in Donellus. To distinguish between the cases in which jurisdiction on private disputes could be delegated and those in which it could not, Donellus added a third category, an '*intermedium genus iurisdictionis*', to the usual contentious and non-contentious ones ('*contentiosa*' and '*voluntaria*' *iurisdictio*, on whose delegability see his *Commentarii de iure civili*, cit., lib. 17, ch. 8, n. 11-12, cols. 1128-1129, and ch. 10, n. 9-12, cols. 1192-1197 respectively). While methodologically important, Donellus' third genus was of lesser practical relevance, consisting mainly in *datio tutoris* (*ibid.*, ch. 8, n. 7, col. 1125, n. 14, col. 1132, and esp. ch. 9, n. 11, cols. 1174-1175), and three other somewhat minor prerogatives ('*transactio alimentorum testamento relictorum*; '*praediorum minoris alienatio*'; '*consilii exercitio*'), *ibid.*, ch. 8, n. 17, cols. 1136-1137). Having thus excluded those prerogatives of *mixtum imperium* which had no connection with *iurisdictio* and could not therefore be delegated, Donellus then used an implied *argumentum a contrario* so to include in the delegable prerogatives also those with very loose connection with *iurisdictio*, such as *praetoria stipulatio* and *missio in possessionem* (*ibid.*, ch. 8, n. 11, cols. 1128-1129). The point was perhaps worth mentioning in full because it seems to strengthen the centrality of the delegability of *mixtum imperium* in most of the legal humanists mentioned in this essay. Had it been just a peripheral point, they would have probably devoted less attention to it and possibly also avoided to structure their argument in such a dangerous way.

<sup>122</sup> Longovallius, *Nova et facilis declaratio*, cit., pt. 4, *fol.* 25v-26r and 30v-32r (on *merum imperium*), and *ibid.*, *fol.* 24v-25r, 26v-27r and 28r-29v (on *mixtum imperium*).

<sup>123</sup> Loriothus, *De iurisdictione et imperio*, cit., axiomata 22 and 24, cols. 35-36, and axioma 31, col. 39; Goveanus, *ad Legem III D. Imperium, De iurisdictione omnium iudicium*, cit., p. 5-6, and *De Iurisdictione libri II, adversus Eguinarium Baronem*, cit., p. 23, 29, 40-41 and 44; Charondas, *de iurisdictione et imperio libellius*, cit., n. 18, *fol.* 55r-v, and esp. n. 25-26, *fol.* 63r; Donellus, *Commentarii de iure civili*, cit., lib. 17, esp. ch. 8, n. 6, cols. 1123-1124. Gillotus went even further, fully equating ordinary judges to higher ones given that they shared the same *potestas iurisdictionis*: Gillotus, *De*

At first sight, the whole debate might appear hardly relevant to contemporary issues. But if we look slightly beyond the Roman facade, the message was pretty clear. As openly stated by Baro with his usual bluntness, if *iurisdictio* is *basse justice*, *mixtum imperium* is *moyenne justice* and *merum imperium* is *haute justice*, it follows that local judges (*magistratus municipales*) enjoy not only *basse*, but also (and moreover) *moyenne justice*.<sup>124</sup> But in the sixteenth century none of the three categories corresponded perfectly to its Roman equivalent. In particular, *haute justice* was not coterminous with *merum imperium* but it was somewhat broader, encompassing also some prerogatives of Roman *mixtum imperium*. If local magistrates enjoyed *mixtum imperium* in full, then they would also have some prerogatives pertaining to *haute justice*.<sup>125</sup>

If we look back at the main (and most quoted) defences of the Bartolian jurisdictional categories in the light of such observations, those apparently abstract (and abstruse) discussions might look quite different. Menochius' insistence on the unity of *imperium*, which could be considered both as species and genus,<sup>126</sup> was aimed at detaching *mixtum imperium* from *iurisdictio*. The more *mixtum imperium* was considered under the genus of *imperium*, the less it would have in common with *iurisdictio*. Far from being a dogmatic digression, Menochius' theory had serious repercussions on the scope of delegated *iurisdictio*. Being two different categories, *mixtum imperium* was not merely instrumental to the exercise of *iurisdictio*. When *iurisdictio* was delegated, therefore, only a few prerogatives pertaining to *mixtum imperium* could accompany it.<sup>127</sup> While studiously avoiding to state as much too openly, Menochius considerably narrowed the powers of the delegated judge in practice.<sup>128</sup> Similarly, Bologneti's division between *actio* and *persecutio* allowed to distinguish fully *mixtum imperium* from *iurisdictio*.<sup>129</sup>

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*iurisditione et imperio libri duo*, cit., pt. 2, ch. 18, n. 1, fol. 14v. By contrast, Baro was somewhat more careful and attentive to the exact scope of D.1.21.1.1: Baro, *Ad digesta iuris civilis l. de iurisdictione*, cit., p. 144. Nonetheless he still overtly argued for the full delegability of *mixtum imperium*: *ibid.*, p. 43, 59, 66, 84, 139, 157, 162, and esp. 97-105 and 147-148. More cautious was (as usual) Corasius, who stated as much in a less overt way: Corasius, *de iurisdictione et imperio*, cit., n. 7-8, p. 276.

<sup>124</sup> Baro, *Ad digesta iuris civilis l. de iurisdictione*, cit., p. 162. See more broadly also *ibid.*, p. 162-165.

<sup>125</sup> *Id.*, *Ad τα πρώτα Digestorum*, cit., tit. 1, fol. 71r-v.

<sup>126</sup> Menochius, *De imperio et iurisdictione commentarii*, cit., lib. 1, ch. 7, n. 2, p. 85: 'Hae opiniones; quae verbis, non sensu differunt, conciliari sic possunt. Mixtum imperium componitur ex Imperio, quod alias, dempta iurisdictione remanet merum, atque ita si consideratur, ut Imperium, sub nomine generis, dicitur simpliciter Imperium: si vero sub nomine speciei, dicitur sublata iurisdictione merum; adiecta autem iurisdictione appellatur mixtum. Et horum sententia mihi etiam probatur.'

<sup>127</sup> *Ibid.*, esp. lib. 1, ch. 24 (q. 17), n. 3 and 5-6, p. 180-183.

<sup>128</sup> The second - and considerably shorter - book of Menochius' treatise is entirely devoted to the distinction between *ordinaria* and *delegata iurisdictio* (*ibid.*, lib. 2, p. 193-214, esp. ch. 5, p. 201-205, ch. 8, p. 209-210, ch. 11, p. 212, and ch. 12, p. 212-214). The approach of Menochius is significantly restrictive on both nature and scope of the powers of the delegated judge (*ibid.*, esp. ch. 4 [q. 4], n. 3-4 and 6, p. 204-205; ch. 10 [q. 10], p. 211; ch. 11 [q. 11], p. 212). And yet he is conspicuously silent on the most debated issue, namely whether *mixtum imperium* may be delegated and, if so, whether it should automatically follow *iurisdictio delegata* (*ibid.*, esp. ch. 13-15, p. 214-221, the obvious *sedes materiae* for such a discussion). The omission is all the more remarkable for two reasons. First, because Menochius was the only author dealing extensively with the subject to avoid the issue. Second, given that the omission itself was just partial, for immediately before he had clearly excluded the delegation of *merum imperium* (*ibid.*, ch. 12 [q. 12], n. 1, p. 213-214), therefore begging the issue when it came to *mixtum imperium*, an omission so remarkable to appear voluntary, all the more given his insistence on the unitary nature of *imperium*.

<sup>129</sup> Bologneti, *In primam Digesti veteris repetitiones*, cit., n. 49, fol. 195v: '*imperium sit iurisdictio quae ex solo motu iudicis vel super persecutionibus (sic) expeditur, et verbum persecutionibus ponit differentiam cum iurisdictione quae expeditur solum super actionibus quae sunt ius formatum in iure*

It followed that *mixtum imperium* was not (to borrow a theological term) 'consubstantial' with *iurisdictio*: their *substantia* was different, both on a procedural level and on a theoretical one. As such, and crucially, *mixtum imperium* did not follow *iurisdictio*, and when *iurisdictio* was delegated *mixtum imperium* was not.<sup>130</sup> Ultimately, Bologneti's three-fold division of both *iurisdictio* and *imperium* (legislative, jurisdictional and equitable) was aimed at structurally preventing any issue on delegation, for the very power to delegate (*potestas delegandi*) did not pertain to judicial *iurisdictio* (*iurisdictio iudiciaria*), but rather to equitable *iurisdictio* (*iurisdictio gratioiosa*).<sup>131</sup> Delegating *iurisdictio* was therefore a matter way beyond the reach of ordinary judges.<sup>132</sup> By the same token, the apparently specious classifications of Obrecht - opposing the *notio* of *iurisdictio* to the *potestas* of *imperium*, stressing the unity of *imperium* and dividing the prerogatives of *mixtum imperium* according to their instrumentality to the exercise of *iurisdictio* - were in fact aimed at detaching *mixtum imperium* from *iurisdictio*, so to narrow as much as possible the prerogatives pertaining to *mixtum imperium* which could be delegated together with *iurisdictio*.<sup>133</sup> Even Bocerus' division between *iurisdictio ordinaria* and *specialis* (or *extraordinaria*) allowed him to keep the vast majority of prerogatives pertaining to *mixtum imperium* away from *iurisdictio*, and therefore to prevent their delegability.<sup>134</sup> In short, far from being convoluted byzantinisms, such re-classifications of the Bartolian scheme were in fact a set of counter-measures to avoid the institutional devolution of *mixtum imperium* to lower judges.

Even if we were to conclude, as any sensible scholar is apparently expected to, that legal humanism was a renaissance of legal culture, selflessly aiming to restore the purity of Roman law for its own sake, some doubts might still linger. Here, we have briefly glimpsed two in particular. Firstly, the effect of those learned observations was

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*consistenti.* *Ibid.*, n. 91, fols. 203v-204r: '[*mixtum imperium*] mixtura consideratur quia ab imperio capit quod ab autoritate dependet, et non fundatur in iure partis principaliter, et a iurisdictione capit quod consistat in causis civilibus. Et ex ista mixtura causantur postea persequutiones (sic) quae sunt medium inter actiones et imperium merum'.

<sup>130</sup> *Ibid.*, n. 16, fols. 188v-189r; cf. also n. 91, fol. 204r.

<sup>131</sup> *Ibid.*, n. 32, fol. 191r.

<sup>132</sup> *Ibid.*, n. 43-44, fols. 193v-194v. Cf. also n. 85, fol. 202r. To be safe, Bologneti used the division between *actio* and *persecutio* to prevent the other possible way to broaden the scope of the jurisdiction of lower judges: the appeal. On the subject, the common understanding was that the competence to hear appellate cases depended on the subject matter. As the court of appeal would hear the same controversy discussed before that of first instance, it did not need broader competences. So, if the subject matter fell within the scope of *iurisdictio*, then (at least in principle) the appellate judge did not need *imperium*. To prevent a delegated judge from being entrusted with the appeal, Bologneti looked at the act of appealing (*admissio appellationis*) and considered it to be beyond the scope of *actio* (i.e. *iurisdictio*) and so within that of *persecutio* (typically, *civilis*), hence requiring *mixtum imperium*. Since lower judges neither had *mixtum imperium* nor could receive it (by delegation), it followed that they could not hear any appeal either. *Ibid.*, esp. n. 101, fol. 206r.

<sup>133</sup> Obrecht, *Disputatio de Iurisdictionis et Imperii Principiis*, cit., theses 227 and 370. Further, the distinction between *notio* and *potestas* allowed Obrecht to insist on the instrumentality of *iurisdictio* to *imperium mixtum* and not vice-versa, as most legal humanists held: *ibid.*, thesis 322.

<sup>134</sup> Bocerus, *Disputatio de iurisdictione*, cit., n. 3 let. b, p. 3, and n. 5, let. a-b, p. 4. Once excluded the delegability of the largest part of *mixtum imperium*, Bocerus happily agreed with legal humanists on the instrumentality of *coercitio* to *iurisdictio* and its delegability, in a *crescendo* of lip-service (*ibid.*, esp. n. 10, let. a-b, p. 7-8, n. 12, let. a-f, p. 9-12, n. 13, let. a-g, p. 12-14). Among the (many) other authors who did substantially as much see e.g. Borrello, *De Magistratum edictis*, cit., lib. 1, ch. 1, n. 114, p. 26-27, and Vulteius, *Commentarius at tit. Codicis*, cit., ad C.3.13, n. 84, p. 50, n. 91, p. 52.

potentially of momentous impact. For their target was a stratified system build on the Accursian Gloss and its Bartolian interpretation, a centuries-old system ultimately still stemming from the very trunk which the humanist jurists were trying so industriously to fell. Secondly, and more specifically, many attacks of legal humanists often had a centrifugal purpose, for they targeted the judicial structure of centralised power.

Even so, all this remains speculation. It is of course possible that all the above debate was a genuine protest led by erudite and accomplished scholars against the great liberties the Bartolists had taken in respect to the Roman texts. And that Civilians were just indulging in tedious, useless and abstract speculations - their speciality, after all. Divesting *imperium* of any legislative and authoritative meaning might appear a harsh attack on a political level, but it may well be a coincidence that the same arguments were pushed to their extreme consequences shortly thereafter by those legal humanists often known as Monarchomacs. Similarly, the fact that the largest portion of nearly all humanistic treatises on our subject focused on delegated jurisdiction and implied the effective freedom of lower tribunals from Royal courts could just be an over-analysis. After all, no *Kulturkampf* has ever had political ends.